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In the Supreme Court of the United States

OCTOBER TERM, 1978

LOUIS RUCCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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The question presented in this criminal tax case is whether the trial court should have suppressed the testimony of certain witnesses whose identities were initially disclosed to federal officials through state-authorized wiretaps.

After a conditional guilty plea, petitioner was convicted in the United States District Court for the Eastern District of New York for income tax evasion,

in violation of 26 U.S.C. 7201, and was sentenced to a three-year prison term. The court of appeals affirmed by order (Pet. App. 7a).[1]

The pertinent facts are undisputed and may be summarized as follows: On May 8, 1973, the New York County District Attorney obtained a court order authorizing interception of communications between petitioner and unknown accomplices, transmitted over two telephone lines located at petitioner's place of business. The purpose of the interception was to gather possible evidence of criminal possession of stolen property, criminal usury, burglary, and conspiracy to commit these crimes. The court extended and amended the order on numerous occasions to include gathering of evidence of payment and receipt of commercial bribes, bribery of a labor official, grand larceny by extortion, coercion, arson, and conspiracy to commit these offenses. The district attorney also obtained separate orders to intercept conversations over petitioner's home telephone and to install eavesdropping devices in petitioner's office. These additional orders were amended and extended; all authorizations expired no later than November 15, 1973 (R. 10a-76a).[2] The recordings of the intercepted conversations were not sealed until January 4, 1974, 49 days after the termination of the last extension (R. 125a).

[1] The Second Circuit has held that an individual may plead guilty and preserve non-jurisdictional points for appeal, provided, as in this case, the government consents and the trial court accepts the reservation. See, *e.g.*, *United States* v. *Mann*, 451 F.2d 346, 347 (1971).

[2] "R." refers to the record appendix filed in the court of appeals.

In the summer of 1974, the state prosecutors engaged in investigating petitioner's activities informed the federal Organized Crime Strike Force for the Southern District of New York that they believed that petitioner might have committed violations of federal law. The prosecutors declined to reveal the basis of their belief because petitioner's activities were the subject of an ongoing grand jury presentation. However, they agreed to disclose to the federal officials the names and addresses of those individuals whom the electronic surveillance revealed to have had business dealings with petitioner. The prosecutors stated that investigation of these persons could produce possible evidence of federal crimes (R. 150a; Tr. of Nov. 22, 1977, at 13). After receipt of the names and addresses, the Strike Force transmitted the information to the Intelligence Division of the Internal Revenue Service, which thereafter conducted a two-year investigation (R. 150a-151a; Tr. of Nov. 22, 1977, at 13-14).

As a result of the New York County investigation and electronic surveillance, petitioner pleaded guilty to usury and was sentenced to a prison term of which he served two years (R. 124a, 151a, 199a). In the state court, petitioner never challenged the tape recordings of his intercepted conversations for lack of timely sealing; however, certain of his co-defendants

had their indictments dismissed on that ground (Tr. of Nov. 22, 1977, at 8-9; R. 125a).

Subsequently, a federal grand jury in the Eastern District of New York charged petitioner with income tax evasion and filing false tax returns for 1970 through 1973. Evidence before the grand jury included testimony of some witnesses whose names and addresses had been disclosed to the government by the local prosecutor as a result of the electronic surveillance authorized by the state court (R. 150a; Tr. of Nov. 22, 1977, at 16). However, no recordings or transcripts of electronic surveillance or any evidence concerning the substance of the intercepted conversations were introduced before the grand jury; nor did any person testify about the circumstances of the disclosure by the local prosecutor to the government.[3]

Petitioner moved to suppress all evidence resulting from the electronic surveillance, contending that the government had failed to amend the state court orders to specify the federal crimes (18 U.S.C. 2517 (5)) and that the federal prosecution was tainted by the state authorities' failure to seal petitioner's recorded conversations in a timely manner as required by 18 U.S.C. 2518(8) (Pet. App. 1a-2a, 5a). The district court denied petitioner's motion (see Pet.

[3] The government represented in the district court, without contradiction, that no federal official had ever seen transcripts, heard recordings, or been told the substance of the intercepted conversations by the state officials (Tr. of Nov. 22, 1977, at 16).

App. 1a-6a), and the court of appeals affirmed (Pet. App. 7a).

1. Petitioner contends (Pet. 11-12) that the government can never bring a tax evasion prosecution when the crime is discovered during the course of electronic surveillance because the federal wiretapping statute (18 U.S.C. 2510 *et seq.*) does not specifically authorize the use of electronic surveillance for the crime of income tax evasion. But even on the assumption that evidence of petitioner's tax evasion was discovered during the course of the electronic surveillance (an assumption that is not borne out by the record—see p. 4, *supra*), Section 2517(5) of the wiretap statute contemplates the use in evidence of communications relating to offenses other than those for which the interception order was approved. The Senate Report accompanying the statute explicitly supports this interpretation, and the federal courts have uniformly so held. See S. Rep. No. 1097, 90th Cong., 2d Sess. 100 (1968); *United States* v. *Masciarelli*, 558 F.2d 1064, 1067 (2d Cir. 1977); *United States* v. *Johnson*, 539 F.2d 181, 188 (D.C. Cir. 1976);[4] *United States* v. *Vento*, 533 F.2d 838, 857

[4] In *Johnson*, the court correctly recognized that there is no difference between an officer who has a legal right to his position within electronic earshot of communications and overhears a conversation relating to an offense not specified in the request for authorization to conduct electronic surveillance, and an officer who sees contraband in plain view from a vantage point where he has a right to be. "[O]ne properly overhearing unexpected villainy need not ignore such evidence" (539 F.2d at 188).

(3d Cir. 1976); *United States* v. *Pacheco*, 489 F.2d 554, 564 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975); *United States* v. *Tortorello*, 480 F.2d 764, 781-783 (2d Cir.), cert. denied, 414 U.S. 866 (1973).

The only decision to the contrary, *People* v. *Schipani*, 56 App. Div. 2d 126, 391 N.Y.S.2d 875 (1977), ignores the explicit legislative history of the wiretap statute. Petitioner argues (Pet. 11-12) that because a state prosecution for a tax offense would be illegal under *Schipani*, the federal government should be prohibited from accepting evidence on a "silver platter" for a federal tax prosecution. But the facts of this case do not implicate the "silver platter" doctrine, under which "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible * * * in a federal criminal trial." *Elkins* v. *United States*, 364 U.S. 206, 223 (1960). Here, if the evidence at issue had been obtained by federal officials in a federal wiretap, it would have been admissible.

2. Petitioner further argues (Pet. 13-14) that the federal officials could not use the information acquired from the local surveillance because the state court orders were never amended to include the crime of income tax evasion. But petitioner fails to take account of the language of Section 2517(5), which requires such an amendment only in those cases where the conversations themselves are presented in

a criminal trial or grand jury proceeding. Here, none of the intercepted conversations was used in evidence by federal officials. Indeed, the intercepted communications themselves were not even revealed to the federal officials. Instead, the state prosecutors told the federal officials that petitioner might have committed violations of federal laws and gave them the names and addresses of individuals whom the electronic surveillance revealed to have had business dealings with petitioner. Where the wiretap evidence is used merely to develop witnesses, amendment is not required. *United States* v. *Johnson*, *supra*, 539 F.2d at 187; S. Rep. No. 1097, *supra*, at 99-100.[5]

3. Finally, petitioner contends (Pet. 15) that the government is not relieved of the prohibition on the use of the fruits of illegal investigation merely because it uses the evidence obtained for investigative purposes rather than testimonial purposes. But there was no illegality here.[6] As we have pointed out above,

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[5] *United States* v. *Marion*, 535 F.2d 697 (2d Cir. 1976), upon which petitioner relies (Pet. 13), is not to the contrary. There, the evidence was presented at a grand jury proceeding; it was in that circumstance that the court held that Section 2517(5) required an amendment of the wiretap authorization.

[6] Petitioner alleges (Pet. 14) "prosecutorial fraud" and asserts that the state authorities deliberately concealed from the state court their intention to misuse the information gathered to commence a federal income tax evasion case. But petitioner made no such argument in the district court (Pet. App. 1a-2a), and there is no evidence to support it. At all events, it hardly can be said that the state authorities knew

Title III requires an amendment to the court authorization only when an intercepted communication relating to an offense other than those specified in the order of authorization is to be used as evidence in a criminal proceeding or grand jury proceeding; the statute does not require an amendment when the evidence is used solely to develop witnesses.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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they were gathering evidence of income tax evasion when the Internal Revenue Service subsequently conducted a two-year investigation before determining that prosecution would be appropriate (see R. 150a-151a; Tr. of Nov. 22, 1977, at 13-14).

[7] The district court also concluded (Pet. App. 5a) that the state's failure to seal the tapes immediately after the expiration of the period of the order did not require suppression because the evidence in the federal tax prosecution was not derived from the tapes. As the court observed, "the reliability of the tapes, used solely to produce the names of witnesses to be interviewed, has only the most attenuated causal relationship with whatever evidence those interviews may have produced" (*ibid.*). This factual determination does not warrant further review.

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